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MADLIS AZID

v.

BOARD OF OFFICERS & ANOR

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
DAVID WONG DAK WAH J
[SUIT NO: BKI-13JR-5-2-2012]
25 MAY 2012

C ***CIVIL PROCEDURE:*** *Judicial review - Application for - Dispute over native title land - Authenticity of native certificate - Application to review native certificate to Board of Officers - Application rejected - Whether interest and rights restored or affected - Whether applicant had necessary locus standi to bring action - Interpretation (Definition of*
D *Native) Ordinance, s. 3(3) - Interpretation of s. 3(3)*

The applicant and 97 others had filed an action against one Chua Yong Kim ('Chua') in respect of a dispute as to the ownership of various parcels of native title land ('native lands') on the ground
E of misrepresentation, *non est factum* and inequality of bargaining power ('suit S-21-62-2009'). Chua relied on his native certificate, which declared that he was a native, thus entitling him to own the native lands. It was the applicant's averment that since he could not challenge the authenticity of Chua's native certificate in the
F suit itself, he sought a review of the native certificate under s. 3(3) of the Interpretation (Definition of Native) Ordinance ('the Ordinance') before the Board of Officers ('the first respondent'). The first respondent rejected the application and hence, the present application to set aside the first respondent's decision. In
G objecting the applicant's application, the first respondent raised the issue of the applicant's *locus standi* and argued, *inter alia*, that in view of the judgment in suit S-21-62-2009, the applicant's interest in the native lands had been restored and therefore, the applicant's interest and rights were not affected by Chua's native
H status. The applicant submitted the applicant's *locus standi* in this judicial review application could not be questioned as he was a Sabah native and he and 97 natives were involved in a court dispute concerning ownership of the native lands with Chua who had in his testimony in court relied on his native certificate to
I justify his ability to hold the native lands. It was further contended

that to construe s. 3(3) of the Ordinance to limit people to seek review of the native certificates to only applicants for native certificates would lead to absurdity. A

Held (dismissing appeal with costs):

(1) The applicant did not have the *locus standi* under s. 3(3) of the Ordinance. Reading the Ordinance as a whole, it was the court's view that the sole purpose of the legislation was to provide a mechanism to people who were qualified under the Ordinance to apply to the Native Court to have his status declared as a native of Sabah as defined in the same. It did not contain any specific provision for challenge by third party before or after the declaration of the native status. The natural inference of s. 3 of the Ordinance was that the review or appeal to the first respondent could only refer to the persons who had failed to obtain native status before the Native Court. Those who were successful in their claim for native status would not ask for review or appeal but this does not mean that there was no remedy to right any incorrect decisions of the Native Court as reflected in the existence of s. 16 of the Native Courts Enactment 1992. (paras 14, 17 & 18) B C D E

(2) There was no dispute that the applicant and the other 97 plaintiffs in suit S21-62-2009 had their ownerships to the native lands restored and the issue of whether or not Chua was a non-native was no more a live issue. The decision was handed down about a month prior to the decision of the first respondent. Once the High Court's decision favoured the applicant and the other 97 plaintiffs in suit S-21-62-2009, the decision of the first respondent had become academic or of no consequence as the applicant was and could not be taken as a person 'adversely affected' by the decision of the first respondent. (paras 23 & 24) F G

Case(s) referred to: H

Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor [1978] 1 LNS 44 FC ***(refd)***

Joseph Paulus Lantip v. Lian Kee Chu & Ors [2011] 6 CLJ 399 CA ***(refd)***

NKM Holdings Sdn Bhd, v. Pan Malaysia Wood Bhd [1986] 1 LNS 79 SC ***(refd)***

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A *R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC* ***(refd)***
Shim Tshun Fatt v. PP [2001] 1 CLJ 154 HC ***(refd)***
Tooheys Ltd v. Minister for Business and Consumer Affairs (1981) 36 ALR 64 ***(refd)***

B **Legislation referred to:**
Federal Constitution, arts. 8, 153(2)
Interpretation (Definition of Native) Ordinance, s. 3(1), (2), (3)
Native Courts Enactment 1992, ss. 3, 16
Rules of the High Court 1980, O. 53 r. 3(2)

C *For the applicant - David Fung (Nizam Salleh with him); M/s Alex Pang & Co*
For the 1st respondent - Martin Idang; M/s Martin Idang Rantau & Co
For the 2nd respondent - Juprin Wong Adamal; Legal Officer Sabah Attorney General Chambers
D *For Chua Yong Kim - Edwin Tsen; M/s Tan Pang Tsen & Co*

Reported by Najib Tamby

E **JUDGMENT**

David Wong Dak Wah J:

Proceeding

F **[1]** This is an application by the applicant to quash or in plain English set aside the decision of the first respondent dated 20 January 2012 in which they rejected the application by the applicant to review of the status of the native certificate of one Chua Yong Kim (Chua).

G **Judicial Review**

[2] This application is what is known in legal term as 'judicial review' which is used to set aside decisions of public authority which the first defendant is. Such application must be made within
H 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant. There is no dispute that this application was made within the period provided for under the law. For such application, the applicant must show to the court that his interests had been
I affected by the decision of the first respondent.

Status Of Chua In This Judicial Review

[3] Chua was not made a party to this judicial review but the same was served on his counsel. The court when giving leave to applicant had also granted leave and time for Chua's counsel to tender his submissions on the applicant's application. Those submissions were given to the court and learned counsel for the applicant on 30 April 2012 and 21 May 2012. Chua also made an application to disqualify the applicant's solicitors from acting for the applicant but this application was later withdrawn and struck out with liberty to file afresh.

Background Facts

[4] By a suit (S-21-62-2009), the applicant and 97 others had sued Chua in respect of a dispute as to the ownership of various parcels of native title land totalling 395.62 acres at Sungai Sugut, Labuk, Sabah (native lands). The legal basis of the suit was grounded on misrepresentation, *non est factum* and inequality of bargaining power. During the trial of that suit, Chua had relied on his native certificate (which declared that he is a native) to entitle him to own the native lands. Learned counsel for the applicant informs the court that in view of undisputed case law, the applicant could not challenge the authenticity of Chua's native certificate in that suit itself and his only revenue was to seek a review before the first respondent. For completeness, the undisputed case law referred to are these:

(a) *Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor* [1978] 1 LNS 44; [1979] 2 MLJ 101 (see pp. 8-9 of FRBOA) at p. 108 in the right column where Lee Hun Hoe CJ (Borneo) said:

> Section 3(2) of the Ordinance makes clear that the native court shall have exclusive jurisdiction to entertain and determine such application and to make such declaration. Section 3(3) of the ordinance provides that there may be an appeal against such declaration as if it were a proceeding or order of the court. Any appeal against such decision would be governed by the provisions of the Native Courts Ordinance (Cap 86). As there has been no appeal the declaration is binding for s. 3(4) of Cap 64 states that such declaration made shall be conclusive evidence for all

purposes in respect of the matter or matters to which it relates. The implication is that appellant is considered a native in Sabah and is entitled to be treated as such under the immigration law. As a native he belongs to Sabah.

(b) *Joseph Paulus Lantip v. Lian Kee Chu & Ors* [2011] 6 CLJ 399, the Court of Appeal also cited *Syed Kechiks'* case *(supra)* at p. 405:

> In our view, the certificate of Sabah Native Court declaring the first defendant as a native of Sabah, in the absence of an appeal against that declaration, is conclusive evidence that the first defendant is a native of Sabah. As it is a final decision, the High Court had correctly accepted it as such: *Datuk Syed Kechik Syed Mohamed v. Government of Malaysia & Anor* [1978] 1 LNS 44; [1979] 2 MLJ 101, FC at pp. 103 and 104 per Suffian LP (as he then was) and at pp. 108 and 109 per Lee Hun Hoe CJ (Borneo) (as he then was).

[5] Hence, learned counsel for the applicant took his client's grievance to the first respondent which he did on 16 March 2011 by way of a letter to have the native certificate reviewed under s. 3(3) of the Interpretation (Definition of Native) Ordinance (Sabah Cap. 64) ("the Interpretation Ordinance"). After a lapse of almost one year, the first respondent on 20 January 2012 made its decision and forwarded the same to the applicant on 27 January 2012. For the sake of clarity and completeness the grounds of decision are produced here as follows:

BOARD OF OFFICERS

(Section 3 subsection (3), Interpretation (Definition of Native) Ordinance (Sabah Cap. 64)

In the matter of a complaint by Madlis bin Azid @ Aziz in respect of the Native Certificate issued to and in the possession of Chua Yong Kim.

In the matter of section 3 subsection (3) of the Interpretation (Definition of Native) Ordinance (Sabah Cap. 64).

By a letter dated 16th March 2011, the Board of Officers (the Board) received a complaint by Mr Madlis bin Azid @ Aziz wherein he complained, amongst others, that the Native Certificate

issued to and held by one Chua Yong Kim was either forged or did not exist at all. In his letter, Mr Madlis bin Azid @ Aziz has cited correspondence from various public and private sources purportedly stating that the Native Certificate in the possession of the said Chua Yong Kim did not exist as it was never issued by the relevant Native Court, namely, the Native Court of Beluran. On the basis of his complaint, the Board has held a meeting to deliberate on the complaint lodged by Mr Madlis bin Azid @ Aziz.

Upon careful reading of the wordings of section 3 subsection (3) of the Interpretation (Definition of Native) Ordinance (Sabah Cap 64) [the said Ordinance], it is the view of the Board that it has no power to revise or scrutinize the said complaint. For this very reason, the Board of Officers has deemed it appropriate not to hear any party as to do so would, in the opinion of the Board be *ultra vires* the provisions of the said section 3(3) of the said Ordinance. The Board has no power to hear the said complaint by Mr Madlis bin Azid @ Aziz. The Board now gives its grounds of decision below.

For the purpose of clarity, the relevant provisions of the said Ordinance are reproduced. Subsection (3) provides:

> Any declaration of any Native Court made in the exercise of the jurisdiction conferred upon it by subsection (2) shall be subject to **review and scrutiny by**, and appeal to the District Officer or a Board of officers appointed by the Yang di-Pertua Negeri for the purpose. (emphasis added)

The term "District Officer" has been substituted for the words "District Native Court" under section 4(1) of the Native Courts Enactment 1992.

Subsection (3) must be read together with subsection (1) of the said Ordinance. Subsection (1) begins with the phrase "Any person claiming to be a native ..."

Therefore, it is the opinion of the Board that a person who is the subject of a revision or scrutiny must necessarily be the person claiming to be a native under subsection (1). Section 3 subsection (3) provides for procedures of appeal or revision in cases where a person whose application for a Native Certificate in the Native Court has been refused. In other words, subsection (3) is a revisionary or appellate process available to an applicant

whose application has been dismissed by the Native Court. In the present complaint, with respect, the said Mr Madlis bin Azid @ Aziz is complaining that the Native Certificate which is in the possession of Chua Yong Kim does not exist for reasons explained in his letter. He is not complaining as an aggrieved applicant for a Native Certificate whose application has been refused or dismissed by the Native Court (of any District). Therefore, in the opinion of the Board, he was not the applicant referred to in subsection (1) of section (3) of the said Ordinance.

Therefore, the Board is of the view that his complaint is not a matter in which the Board has the power to review or scrutinize under section 3 subsection (3) of the said Ordinance.

In arriving at the above decision the Board has noted that the above complaint was also a matter which was raised in a consolidated trial in Suit No. S-22-45 of 2001, *Joseph Paulus Lantip v. Lian Kee Chu & 109 Ors* and Suit No. S-22-46 of 2001, *Joseph Paulus Lantip v. Lian Kee Chu & 275 Ors* and in respect of which the Judgment of His Lordship Mr Justice Datuk Linton Albert was delivered on 29th October 2007. Subsequently, upheld by the Court of Appeal in Civil Appeal No: S-02-136-2008 on the 9th June 2011.

Dated at Kota Kinabalu this 20th Jan 2012.

...
Datuk Abidin Madingkir
Chairman
Board of Officers

[6] The above grounds are self explanatory and require no further explanation from me.

The First Respondent's Position

[7] Apart from what is stated in their grounds dated 20 January 2012, learned counsel for the first respondent had raised further grounds in objecting to the applicant's application which can be summarised as follows:

(a) The applicant had not complied with O. 53 r. 3(2) RHC in that he had not set out in details his interest in the matter.

(b) In view of the judgment after trial dated 23 December 2011 in Suit S-21-62-2009, the applicant's interest in the native lands had been restored and hence applicant's interest and rights are not affected by Chua's native status.

(c) The law as it stood in 1981, any application for review must be applied for within 60 days from 15 August 1981, and as such the applicant is out of time.

(d) Section 3(3) of the Interpretation Ordinance was enacted in 1984 and was not made retrospective, hence the first respondent had no right to review a native certificate issued in 1981 as then there was no board of officers in existence.

The Applicant's Position

[8] Counsel for the applicant submits that to construe s. 3(3) of the Interpretation Ordinance to limit people to seek for review of the native certificates to only applicants for native certificates is irrational on ground of "Wednesbury unreasonableness" or in plain English that interpretation which the first respondent gives to s. 3(3) is so outrageous that will lead to absurdity. It is further contended that the applicant's *locus standi* in this judicial review application cannot be questioned as he is a Sabah native and he and 97 natives are involved in a court dispute concerning ownership of the native lands with Chua who had in his testimony in court relied on his native certificate to justify his ability to hold the native lands. Counsel for the applicant had also submitted that to sustain the first respondent's construction of the s. 3(3) of the Interpretation Ordinance would mean that the applicant would be denied his right of access to justice which would infringe art. 8 of the Federal Constitution which states that 'all persons are equal before the law and entitled to the equal protection of the law'.

[9] In this case, it is alleged that Chua's mother was not one "Mariamah binti Berahim" of Sino-Brunei descent as he had testified that both his parents are from China. And in view of this damaging evidence, learned counsel for the applicant urges the court exercise its discretion (see *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147) to review the substance of the first respondent's decision and set it aside and declare that Chua as a non native.

A

Court Findings

Construction Of S. 3(3) Of The Interpretation Ordinance

[10] The crux of this application is undisputedly the construction of s. 3 of the Interpretation Ordinance which reads as follows:

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Powers of Native Courts:

3. (1) Any person claiming to be a native may apply to a Native Court established under the Native Courts Enactment, 1992 [En. No. 3/1992] and having jurisdiction in the area in which such person resides to declare:

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(a) that such person is recognized by native law and custom as the parent or child, as the case may be, of any other person; or

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(b) that such person is a member of a native community, has so lived during any stated period, and while so living has borne a good character; or

(c) that such person is a member of a people named in paragraphs (c) or (d) of subsection (1) of section 2; or

E

(d) that a parent of such person is or was a member of a people named in paragraph (c) of subsection (1) of section 2 and living, or if deceased is buried or reputed to be buried, in Sabah.

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(2) Subject to the provision of subsection (3) of this section, any Native Court referred to in subsection (1) to whom an application is properly made under such subsection shall have exclusive jurisdiction to entertain and determine any such application and to make such declaration as the case requires.

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(3) Any declaration of any Native Court made in the exercise of the jurisdiction conferred upon it by subsection (2) shall be subject to review and scrutiny by, and appeal to the District Officer or a Board of officers appointed by the Yang di-Pertua Negeri for the purpose.

H

(4) The final decision on any application made under subsection (1) shall be conclusive evidence for all purposes in respect of the matter or matters to which it relates.

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[11] In determining the meaning of any statute, I must apply established rules of construction and have no concern with the policy of the statute, which I am called upon to interpret. This is how the Supreme Court through the judgment of Seah SCJ in *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1986] 1 LNS 79; [1987] 1 MLJ 39 spelt out the role of the court:

> The constitutional function of the courts is not only to interpret but also to enforce the laws enacted. In enforcing the law we must be the first to obey it. It should be noted that the power of a court to proceed in a particular course of administering justice, was one of substance and not merely of form. The duty of the court, and its only duty, is to expound the language of the act in accordance with settled rules of construction. The court has nothing to do with the policy of any act which it may be called upon to interpret.

[12] The primary task of the court is simply to look at the words employed by the legislators and give those words their natural or plain meaning even if it may lead to mischief provided that there is no ambiguity in the words used. If however, the words used give rise to different meanings, then the court must adopt a purposive approach in extracting the meaning of the words used. In executing this task the court must not view the impugned section in isolation. It must be viewed with reference to the context and other sections of the Act, so as to make the whole statute consistent (see *Shim Tshun Fatt v. PP* [2001] 1 CLJ 154; [2001] 5 MLJ 40).

[13] With that I revert to the task before me. From a cursory glance of the Interpretation Ordinance, it only contains a mere four pages which in essence contains three matters:

(a) Defines who can apply for a declaration as a native of Sabah,

(b) Such application must be made before a Native Court established under the Native Courts Enactment 1992 and

(c) Such declaration by the Native Court shall be final and conclusive.

[14] Reading the Interpretation Ordinance as a whole, it is my view the sole purpose of this piece of legislation is to provide a mechanism to people who are qualified under the Interpretation Ordinance to apply to the Native Court to have his status declared as a native of Sabah as defined in the same. It does not contain any specific provision for challenge by third party before or after the declaration of the native status.

[15] Counsel for the applicant however submits that the court must read into s. 3(3) of the Interpretation Ordinance to allow strangers or third party with interest to intervene in the application proceedings for native status. With respect, I disagree for the simple reason that if that was the intention of the legislators; they could have easily put the words 'subject to appeal for review by a party apart from the person claiming to be a native for native status' or similar words to that effect in s. 3(3) of the Interpretation Ordinance. Established rules of construction prohibit the court from inserting words into legislation. As stated earlier the court's task is to interpret and not to legislate.

[16] Further one cannot ignore the fact that ss. 3(1), 3(2) and 3(3) are interrelated to each other or in the words of learned counsel for the first respondent, they are a series of 'nesting provisions'. As pointed out by learned counsel for the first respondent, each sub-section is made subject to the sub-section immediately preceding it. The style of drafting of this provision in my view leads to the natural conclusion that s. 3(1) is the parent provision with s. 3(2) and (3) as the offspring provision so to speak. It can be said that the Interpretation Ordinance was created by the legislators to ensure that qualified persons are not disenfranchised from their rights to be called as natives of Sabah and hence obtaining the protection and privilege accorded to them by art. 153(2) of the Federal Constitution.

[17] In view of my analysis of s. 3 of the Interpretation Ordinance, the natural inference is that the review or appeal to the first respondent hence could only refer to the persons who had failed to obtain native status before the Native Court.

[18] Those who are successful in their claim for native status of course would not ask for review or appeal but does that mean that there is no remedy to right any incorrect decisions of

the Native Court? That of course could not be the intention of the legislators and this is reflected in the existence of s. 16 of the Native Courts Enactment 1992 which provides as follows:

Power of revision.

16. (1) All proceedings of every Native Court shall be subject to revision by the District Native Court which, if it considers that such proceedings are irregular, improper or unconscionable, may quash or vary the same or direct a rehearing.

(2) A District Native Court may call for and examine the record of proceedings of a Native Court for the purpose of satisfying itself as to the correctness, legality or propriety of any order recorded or passed and as to the regularity of any proceedings of such court.

(3) In exercising its powers of revision, a District Native Court shall have the discretion whether to allow the parties involved a right to be heard:

Provided that no final order shall be made to the prejudice of any person unless such person has had an opportunity of being so heard.

[19] It can be seen from the words of this provision that the legislators had envisaged that the Native Courts in Sabah may commit errors in their judicial duties and provided a mechanism as to how those errors could be rectified. One can also see that the legislators' intention is to ensure matters concerning with native rights ought to be dealt with the Native Courts. Further s. 16 of the Native Courts Enactment 1992 has inbuilt safeguard which requires the District Native Court when hearing a revision must also hear anyone who may be prejudiced by its revision which invariably would be the native certificate holder. The inbuilt safeguard reflects the basic principle of natural justice and that is 'no one is to be condemned unless he or she is given the chance to state his or her case'. Any breach of this principle would only lead to one result and that is the decision cannot stand and must be set aside.

[20] For reasons stated above, I find that the applicant does not have the *locus standi* under s. 3(3) of the Interpretation Ordinance.

A **Order 53 r. 3(2) RHC**

[21] Though it is not necessary for me to deal with this issue, I do so for completeness as it has been fully argued in counsel's submissions.

B **[22]** This order provides that only person "adversely affected" has the right to apply for judicial review of decisions of any public authority. What the phrase 'adversely affected' mean can be seen from the case of *Tooheys Ltd v. Minister for Business and Consumer Affairs* [1981] 36 ALR 64 where Ellicott J said this:

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> The words "a person who is aggrieved" should not in my view be given a narrow construction. They should not, therefore, be confined to persons who can establish that they have a legal interest at stake in the making of the decision. It is unnecessary
> D and undesirable to discuss the full impact of the phrase. I am satisfied from the broad nature of the discretions which are subject to review and from the fact that procedures are complex prerogative writ procedures that a narrow meaning was not intended. This does not mean that any member of the public can seek an order of review. I am satisfied, however, that it at least
> E covers a person who can show a grievance which will be suffered as a result of a decision complained of beyond that which he or she has as an ordinary member of the public. In many cases the grievance will be shown because the decision directly affects his or her existing or future legal rights. In some cases, however,
> F the effect may be less direct. It may affect him or her in the conduct of a business or may, as I think is the case here, affect his or her rights against third parties.

[23] In this case, there is no dispute that the applicant and the other 97 plaintiffs in the Civil Case of S21-62-2009 had their
G ownerships to the native lands restored by a judgment of the High Court of Sandakan on 23 December 2011. In another word, the applicant's right to the native lands has been restored and the issue of whether or not Chua is a non native is no more a live issue. For that matter, it was never an issue in the above suit as
H the learned Judicial Commissioner did not consider Chua's status in his grounds of decision.

[24] Under such circumstances, can the court say that the first respondent's decision dated 20 January 2012 affected the
I existing or future rights of the applicant in the native lands under dispute. The decision of the High Court of Sandakan was handed

down about a month prior to the decision of the first respondent. In my view once the High Court's decision favoured the applicant and the other 97 plaintiffs in the Civil Suit S-21-62-2009, the decision of the first respondent had become academic or of no consequence as the applicant is and cannot be taken as a person 'adversely affected' by the decision of the first respondent.

Conclusion

[25] For all the reasons stated above, the applicant's application for judicial review is dismissed with costs in the following manner:

(a) for the first respondent, the sum of RM15,000;

(b) for the 2nd respondent, the sum of RM1,000;

(c) for Chua, the sum of RM5,000.

Order accordingly.